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| APPLICATION NO.   | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO.            | CONFIRMATION NO. |
|---|-------------|----------------------|--------------------------------|------------------|
| 10/524,174  | 03/03/2006  | Frederic Fortin      | 3338.62US01                    | 2469             |
| 22852   | 7590        | 05/15/2009           |                                |                  |
| FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER<br>LLP<br>901 NEW YORK AVENUE, NW<br>WASHINGTON, DC 20001-4413 |             |                      | EXAMINER<br>FISHER, ELANA BETH |                  |
|   |             |                      | ART UNIT                       | PAPER NUMBER     |
|   |             |                      | 3733                           |                  |
|   |             |                      | MAIL DATE                      | DELIVERY MODE    |
|   |             |                      | 05/15/2009                     | PAPER            |

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/524,174

**Applicant(s)**

FORTIN ET AL.

**Examiner**

ELANA B. FISHER

**Art Unit**

3733

**Period for Reply** -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 20 March 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 13-22 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 13-22 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 20 March 2009 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-850)
- 4) ☐ Interview Summary (PTO-413)
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_
- Paper No(s)/Mail Date 03/20/2009

**DETAILED ACTION**

***Drawings***

1. The drawings were received on March 20, 2009. These drawings are accepted.

***Claim Rejections - 35 USC § 103***

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all

obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 13-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fortin (WIPO Publication 2000/72768 A1) in view of Navas (U.S. Patent 5,375,823).

Fortin discloses a device comprising: a first rod member (35) having a first end (38); a second rod member (36) having a second end (39); a mechanical coupler (300) connecting the first rod member to the second rod member and allowing adjustment of the positions of the first rod member and the second rod member such that a distance between the first end of the first rod member and the second end of the second rod member can be controlled to straighten the spine of a patient, wherein at least one of the first rod member (35) and the second rod member (36) is serrated (FIG 14), and wherein the first rod member and the second rod member are curved (FIG 14). Additionally, the second end (39) includes a hook member configured to engage a rib (FIG 14).

However Fortin fails to disclose first and second dampening members coupled to the first and second ends (38, 39) of the first and second rod members (35, 36). Navas discloses a device comprising a rod member (30) having a dampening member (1), with a

first end of the dampening member (1) coupled to a first end of the rod member (FIG 2) and a second end of the dampening member (11) configured to be coupled to a first bone structure (FIG 4), wherein the damping member comprises: a rigid cylinder; a first elastic member (4) disposed within the rigid cylinder; and a second elastic member (6) disposed within the rigid cylinder, wherein the first end of the first rod member (30) includes an enlarged distal portion (3) disposed between the first elastic member and second elastic member (FIG 2). It therefore would have been obvious to one skilled in the art to modify the device taught by Fortin, by having a dampening member attached to the first and second ends (38, 39) of the first and second rod members (35, 36) as is taught by Navas, because the dampening device can act as a shock absorber, aiding in the dampening of stresses and strains put on the device as movement occurs in the body of the patient.

#### ***Response to Arguments***

4. Applicant's arguments with respect to claims 13-22 have been considered but are moot in view of the new ground(s) of rejection.

#### ***Conclusion***

5. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period

will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ELANA B. FISHER whose telephone number is (571)270-3643. The examiner can normally be reached on Monday through Friday from 8:30AM to 5:00PM EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on (571)272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Elana B Fisher/  
Examiner, Art Unit 3733  
/Eduardo C. Robert/  
Supervisory Patent Examiner, Art Unit 3733